

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 405 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

KANTILAL CHHOTALAL MODHIA

Versus

MANEKLAL CHHOTALAL MODHIA

Appearance:

MR MIHIR H JOSHI for Petitioner
MR DF AMIN for Respondent No. 1
SERVED for Respondent No. 2, 3, 4

CORAM : MR.JUSTICE S.D.SHAH

Date of decision: 06/05/96

ORAL JUDGEMENT

1. The petitioner is the original defendant who is aggrieved by the judgment and order passed by Second Extra Assistant Judge, Panchmahals at Godhra in Misc. Civil Appeal No. 30 of 1995. By the said judgment, the appeal preferred by the respondent No.1 plaintiff is allowed and the order passed by the trial court below Exhibit 5 in Regular Civil Suit No. 53 of 1994 is

quashed and set aside and parties are directed to maintain status quo as to the possession of the properties.

2. It appears that respondent No.1 plaintiff Maneklal Chotalal instituted the suit for partition of the parties inter alia alleging that though an agreement of partition was executed between himself, his brothers and father, no partition by metes bound has taken place and that various properties described in the schedule to the plaint were ancestral properties, which were liable to be partitioned. He further alleged that by a registered will executed by his father Maneklal Chotalal dated 5th of October, 1978, number of properties are bequeathed to Kantilal Chotalal - present petitioner (original defendant No.3). He further alleged that such properties were ancestral properties which the father could not have disposed of by testamentary disposition and that therefore the defendants were required to be restrained by an order of injunction from transferring such property.

3. The defendants resisted the suit and contended by reply at Exhibit 28 that the suit properties were in fact partitioned by a deed of partition dated 10th of April, 1962 and in such partition specific property which has fallen to the share of each coparcener was mentioned. It was further averred that one house bearing City Survey No. 4790 situated at Dahod went to the share of present respondent No.1 Maneklal Chhotlal and after mutating the said house to his name, he has not only disposed of the said house but has utilised the realization thereof for his own use. It was further averred that other two houses which fell to the share of the other defendants were also entered into their names in the revenue record and they were put into possession thereof. It was further averred that the properties which had fallen to the share of the father remained with the father and they were also mutated in the revenue record in the name of the father. The aforesaid partition was therefore totally worked out and suit for partition filed by the respondent No.1 plaintiff was therefore misconceived and he was not entitled to any injunction. It was contended by the present petitioner defendant No.3 that in fact by subsequent registered deed executed by the father, the various properties were bequeathed to the present petitioner as the father was residing with him and was being looked after by him and as he was looking after the sister and the mother also. This is clearly stated in the registered will.

4. Having heard the learned Counsel Mr. Mihir Joshi for the petitioner and Mr. D.F. Amin for respondent No.1, there is no manner of doubt that the partition which was sought to be effected by document dated 10th April, 1962 was worked out in the sense that whichever fell to the share of the party was transferred and mutated to his name and that party was put into possession thereof. However, the contention of Mr. D.F. Amin is that it was only a partial partition and in fact number of other houses at village Gangardi were not partitioned and number of agricultural parcels of land were also not partitioned. He, therefore, submitted that a suit for full partition was maintainable and the petitioner defendant was required to be restrained from transferring the suit properties.

5. Even if the aforesaid contention is to be accepted, the respondent No.1 plaintiff at the most can have 1/5th share and nothing beyond that. In fact, reading the memo of partition and the registered will, one can prima facie come to the conclusion that the properties which had fallen to the share of the father are bequeathed by him in favour of the youngest son Kantilal Chhotalal. However, at this stage, no final finding could be recorded. In view of the aforesaid, by consensus of opinion between the parties, the interest of justice would be met if following injunction is issued:

(i) The petitioner defendant shall not transfer, alienate, encumber or assign the properties bearing Village Panchayat No. 71 - 97 at village Gangardi during the pendency of the suit and he also shall not alienate survey No. 99 admeasuring 15 acres and 30 gunthas situated at Village Tumki Anop during the pendency of the suit. With respect to the rest of the properties, the injunction granted by the lower appellate court directing the petitioner to maintain status quo is vacated. This order would sufficiently safeguard the interest of the plaintiff inasmuch, as at the most, he can have only 1/5th share in the property and nothing beyond that.

6. Rule is accordingly made absolute to the aforesaid extent only. No costs.
